Loyalhanna Health Care Associates t/d/b/a Loyalhanna Care Center *and* Cynthia A. Clark, Erica J. Lewis, Melanie M. Fritz. Cases 6–CA–28609, 6–CA–28676 and 6–CA–28676–2

# October 30, 2000 DECISION AND ORDER

## BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 7, 1998, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with the Decision and Order.

Contrary to the judge, we find that nurses Cynthia Clark, Melanie Fritz, and Erica Lewis are not statutory supervisors. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act, as alleged, when it threatened Lewis with the loss of her nursing license, issued "friendly reminders" and other disciplinary warnings to Fritz and Lewis, and discharged all three nurses.

The operative facts, as set forth in detail in the judge's decision, are these. On September 25, 1996, nurse Cynthia Clark complained to assistant director of nursing (ADON), Jacqueline Gaydar, about her work schedule, having forgotten that she (Clark) had agreed to substitute for another nurse on the following Saturday. On learning of her mistake, Clark apologized to Gaydar for the error. As the conversation continued, Clark and nurse Melanie Fritz complained to Gaydar generally about wages, staffing levels, and working conditions. Nurse Erica Lewis was present during the discussion. The judge found "a lack of record evidence to show that the nurses [complained] in such a manner as would result in a loss of the Act's protections."

The next day director of nursing (DON), Carol Miller, discharged Clark and disciplined Fritz purportedly for treating a supervisor with disrespect and creating disharmony by complaining about wages and staffing. The nurses denied Miller's accusations. When Lewis learned about the disciplinary actions against Clark and Fritz, she told Miller that Clark had not raised her voice and had

apologized about her mistake concerning the schedule. Miller professed that she had been "unaware of those facts." The Respondent discharged Clark, nonetheless.

Fritz and Lewis testified on behalf of Clark at an unemployment compensation hearing on November 8. 1996. The Respondent disciplined Fritz and Lewis immediately upon their return to work after the hearing, ostensibly based on a complaint by Rita Palguta, the daughter of a resident. According to the Respondent, Palguta had complained that Fritz and Lewis were ignoring call lights and allowing aides to take breaks together, and that Lewis failed to notice and treat a patient's elevated body temperature and failed to check patients' records for abnormalities in their vital signs. ADON Gavdar threatened Lewis that Lewis could "lose your license for this." Concurrent with the discipline of Fritz and Lewis, Gaydar expressed to them her displeasure over their testimony on Clark's behalf. Fritz and Lewis denied Gaydar's accusations of wrongdoing and accused Gaydar of retaliating against them for their testimony at Clark's unemployment hearing.

Upset over the discipline, Fritz and Lewis tendered 2-week resignation notices on November 11.<sup>2</sup> Lewis met Palguta in the hallway and told her about the disciplinary actions. Palguta denied having complained about the nurses, then accompanied Lewis to Gaydar's office where she repeated the denial.<sup>3</sup> The Respondent discharged Fritz and Lewis before the end of their 2-week notice periods.<sup>4</sup>

The judge found that Gaydar threatened Lewis with the loss of her nursing license in retaliation for protected concerted activities, including her testimony on Clark's behalf at an unemployment compensation hearing. The judge further found that the Respondent's issuance of "friendly reminders" and written warnings to Fritz and Lewis, and its discharge of Clark, Fritz, and Lewis were retaliatory, in light of the timing of the disciplinary ac-

<sup>&</sup>lt;sup>1</sup> In its answering brief, the Respondent has contested some of the judge's credibility findings. The Board's established policy is not to overrule an administrative Law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Further, the Respondent did not file exceptions to the judge's findings.

<sup>&</sup>lt;sup>2</sup> The Respondent's acceptance of 2-weeks' resignation notice from Lewis and Fritz belies its claim that it considered them supervisors. Respondent's employee handbook expressly requires 2-week notice from nonsupervisors and 1-month notice from supervisors. There is no evidence that the Respondent attempted to obtain 1-month notice from Fritz or Lewis.

<sup>&</sup>lt;sup>3</sup> Palguta also testified to this effect at the hearing, and further testified that she received assurances from DON Miller that Fritz and Lewis left the Respondent's employ for unrelated reasons.

<sup>&</sup>lt;sup>4</sup> Miller testified that she did not permit Lewis to finish out her notice period because she was disruptive and had a bad attitude and that she let Fritz go because the Respondent had obtained a replacement for her. The judge discredited Miller's testimony. The judge noted that there is no evidence to corroborate Miller's testimony regarding Lewis. Further, the judge found that record evidence contradicts the Respondent's explanation regarding Fritz. Specifically, documentary evidence shows that other nurses worked double shifts on the 5 or 6 days on which Fritz had been scheduled to work prior to her discharge.

tions, the Respondent's animus towards the nurses for testifying on Clark's behalf, and the "patently groundless reasons assigned to support the discipline." Accordingly, the judge found that the "General Counsel's strong prima facie case of retaliatory discharge and discipline stands unrebutted," and that the Respondent had not shown that it would have threatened Lewis with the loss of her nursing license, issued warnings to Fritz and Lewis, or discharged the three nurses absent their concerted activities.<sup>5</sup>

We agree with the judge's analysis of the Respondent's conduct in regard to nurses Clark, Fritz, and Lewis. Accordingly, if the nurses are statutory employees, their activities are protected and the Respondent's above-described conduct violated the Act. The burden to show supervisory status rests on the party alleging such status. Northcrest Nursing Home, 313 NLRB 491, 496 fn. 26 (1993); S. S. Joachim & Anne Residence, 314 NLRB 1191, 1194 (1994). Contrary to the judge, we find that the Respondent has not satisfied its burden.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Respondent does not contend that the nurses have the authority to hire, permanently transfer, suspend, lay off, recall, promote, discharge, or reward employees, or to adjust their grievances.<sup>7</sup>

The Respondent contends that the nurses effectively recommend disciplinary action under its progressive disciplinary system. It relies on the portion of the RN job description that states that nurses have "the ability to

<sup>5</sup> Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The Respondent has not excepted to the judge's findings.

reprimand and/or dismiss personnel." DON Miller testified that the Respondent follows nurses' disciplinary recommendations when they are made. The Respondent admits, however, that nurses are not required to recommend particular discipline and that they "may" but "seldom do" so. The record reveals only that nurses, usually acting pursuant to an admitted supervisor's direction, record on the Respondent's preprinted disciplinary form a statement of facts describing the incident complained of. The nurse signs the form on the line titled "person who prepared warning." After completing the fact statement, the nurse turns the disciplinary form over to the DON, ADON, or patient care coordinator<sup>8</sup> for independent investigation of the incident and a determination regarding what, if any, discipline is warranted. There is no credible evidence that a nurse has made a disciplinary recommendation in any case. The investigating supervisor signs the form on a separate "supervisor" signature

Having considered this evidence, the judge did not base his supervisory determination on the nurses' participation in the Employer's disciplinary scheme. Nor could he have reasonably done so, on the record evidence. The nurses' role is limited to recording the facts surrounding a potential disciplinary incident, as observed or presented to them, without further inquiry and without a recommended disposition. Thus, we find that the nurses' role is merely reportorial and is not indicative of statutory supervisory status. See *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Illinois Veterans Home*, 323 NLRB 890, 891 (1997).

The judge concluded that nurses Clark, Fritz, and Lewis were supervisors based, "at the very least," on their responsibly assigning and directing employees. In that regard, the judge found that nurses were responsible for: ensuring the quality of patient care on their floors; changing employee work assignments and temporarily transferring employees to equalize workloads and meet emergency needs; selecting and calling employees in to work in place of absentees; and allowing employees to take time off, e.g., to guit working before the end of a shift. The judge noted that "nurses are evaluated, in part, on their ability to take charge of and direct staff." In addition, the judge gave substantial weight to the fact that nurses are the highest-ranking employees on duty for 14–16 hours a day. As we explain below, we do not find that these factors, individually or together, warrant a supervisory finding.

Nurses provide direction to aides in conjunction with the nurses' responsibility for ensuring the quality of care.

<sup>&</sup>lt;sup>6</sup> Although the Board has sometimes phrased the General Counsel's burden under *Wright Line* in terms of establishing a prima facie case sufficient to support an inference that the employees' protected activities were a motivating factor in an employer's decision, the Board has made it clear that, under *Wright Line*, the General Counsel must establish that the employees' protected conduct was, in fact, a motivating factor in the Respondent's decision. See, e.g., *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). We agree with the judge that the General Counsel clearly carried that burden in this case.

<sup>&</sup>lt;sup>7</sup> Indeed, the position descriptions for registered nurses proffered by the Respondent expressly require nurses to "[r]efer[] patient or personnel grievances to the Patient Care Coordinator, the Director of Nursing, or the Administrator."

<sup>&</sup>lt;sup>8</sup> All three are admitted supervisors.

In that regard, nurses are responsible for overseeing aides in the performance of their patient-care duties and correcting their work, if necessary, in order to ensure that their work performance meets accepted standards of patient care, as set forth in rules and regulations governing long-term care facilities. Thus, nurses have the authority to require aides to reschedule their breaks if patient needs dictate that they remain in the patient care areas. The evidence shows that nurses can permit an aide to quit work before the end of a shift in two circumstances, i.e., if the aide is ill or has a family emergency.

There is no evidence showing that nurses' direction of aides involves other than routine aspects of patient care, such as taking residents' vital signs, assisting residents with tasks of daily living, and ensuring that care plans are followed. Further, there is no evidence that nurses are exercising independent supervisory judgment in overseeing—and, if necessary, correcting—aides' performance of patient-care activities and break schedules. Such direction reflects nothing more than the exercise of the nurses' greater training, skill, and experience in helping less skilled employees perform their jobs correctly. As the Board stated in *Providence Hospital*, 320 NLRB 717, 729 (1996):

Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position . . . .

Nor is there evidence that the nurses' exercise of authority to grant aides emergency (early) release from work is supervisory. On the record before us, there does not appear to be any substantial degree of judgment involved in permitting an employee who is too ill to work, or one who experiences a family emergency, to go home. Similarly, the determination of breaktimes based on resident needs does not require independent supervisory judgment.

We also find no probative evidence that nurses exercise independent judgment in their assignment of work to employees. DON Miller and Resident Care Coordinator Ream prepare work-assignment schedules for nurses and aides. There is no evidence that nurses participate in this initial assignment process. Miller testified that nurses can reassign aides to equalize workloads in the event of a staffing shortage, e.g., when an aide calls in sick, in order to ensure that residents receive "quality care." Nurses also have the authority to reassign aides in response to emergency situations, e.g., when a resident becomes acutely ill, or suicidal, or badly confused. It appears that such reassignments are routine and are made on a recurring basis. There is no evidence indicating that nurses use independent judgment in making the reassignments.

Rather, the reassignment of aides appears to involve nothing more than routine deployment of available aides to serve a particular patient population. See *Illinois Veterans Home*, supra at 891.

The Respondent contends that nurses on one wing of the Respondent's facility have the authority to reassign employees temporarily from the other wing to help out in emergencies, and that such authority warrants a supervisory finding. The record does not support this contention. There is no evidence that nurses on one wing can compel employees from the other to accept such reassignments. The inability of nurses to compel temporary reassignments was a subject of the September 25 discussion between nurse Clark and ADON Gaydar, which gave rise to the instant unfair labor practice complaint. Clark complained to Gaydar that the north wing needed a third full-time employee on the afternoon shift. Gaydar told Clark that the Respondent would not hire an additional nurse and that the north wing nurses should call the south wing for help when needed. Clark responded that when called, employees from the south wing "do not always come." Gaydar did not dispute Clark's statement, or suggest that south wing personnel were required to respond, or that a failure to respond would have any adverse consequence. Thus, the evidence does not demonstrate that nurses have the authority to assign employees temporarily, or even effectively to recommend their reassignment.

We conclude that, at most, nurses on the north and south wings have equal authority to ask for help and, if asked, to decide whether or not to provide help. Such authority to ask for or to make temporary reassignments between wings to meet obvious staffing needs is limited in scope and practice and "is not significantly more complicated than counting" the number of employees available. *Providence Hospital*, supra at 732. Such limited authority does not require the use of independent judgment and is, therefore, not indicative of supervisory status.

In further support of its contention that the nurses are supervisors, the Respondent asserts that they have the authority to ask employees to work beyond the end of a shift or to call employees in to work in place of absentees. The resident care coordinator bears this responsibility during the day shift. On other shifts, nurses call in off-duty employees using a preexisting call list. There is no evidence that the nurses exercise independent judgment in determining whom they will ask to work. Neither is there evidence that they can, in the exercise of their judgment, compel an employee to overstay a shift

or report to work outside of the normal schedule. The record does not support a finding of supervisory authority on this basis.

The Respondent asserts that nurses are evaluated, in part, on their assignment and direction of employees. In support, the Respondent entered into the record copies of its evaluation forms for Clark and Fritz, which refer to their "tak[ing] charge of" and "direct[ing] subordinates." We find negligible support for the Respondent's assertion in these evaluation forms. The Respondent's comments regarding the nurses' "tak[ing] charge of and direct[ing] subordinates" were handwritten by the evaluating official in the section of the evaluation form entitled "Relationships With Others." That section calls for an assessment of "[h]ow well [the] employee interacts with the residents' [sic] and coworkers to establish effective working conditions." It does not suggest that the performance of supervisory duties is being evaluated. In any event, such evidence of evaluation of nurses is at most a secondary indicator of supervision and fails to show that the nurses in fact possess supervisory authority.

In the absence of evidence that nurses Clark, Lewis, and Fritz exhibited any primary statutory indicia of supervisory authority, we are not persuaded by the judge's reliance on secondary indicia, such as the fact that registered nurses are the highest-ranking employees on duty at the facility for 14–16 hours each day. *Juniper Industries*, 311 NLRB 109, 110 (1993). In any case, director of nursing, Carol Miller, testified that she is available on call 24 hours a day. The Board, has held, with judicial approval, that being the highest-ranking employee on the premises does not necessarily make that employee a statutory supervisor, particularly where, as here, a stipulated supervisor is on call. See *Northcrest Nursing Home*, 313 NLRB 491, 499–500 (1993), and cases discussed therein.

Having found that the Respondent's nurses do not exercise independent judgment with regard to any of the indicia of supervisory authority set forth in Section 2(11) of the Act, we find that they are employees and not supervisors. Accordingly, we reverse the judge's finding to the contrary and find that the Respondent violated the Act as alleged. Accordingly, we shall order the Respondent, inter alia, to offer Clark, Fritz, and Lewis full rein-

statement to their former jobs and make them whole, with interest, for any loss of earnings or other benefits suffered as a result of their unlawful discharges.<sup>10</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Loyalhanna Health Care Associates, t/d/b/a Loyalhanna Care Center, Latrobe, Pennsylvania, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Threatening employees with the loss of their registered nursing licenses because they engage in protected concerted activities.
- (b) Issuing disciplinary warnings to employees because they engage in protected concerted activities.
- (c) Discharging employees because they engage in protected concerted activities.
- (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order offer Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, with interest.
- (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline of Erica J. Lewis and Melanie M. Fritz, and the unlawful discharges of Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline and discharges will not be used against them in any way.
- (c) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Within 14 days after service by the Region, post at its Latrobe, Pennsylvania facility copies of the attached notice marked "Appendix." Copies of the notice, on

<sup>&</sup>lt;sup>9</sup> In this regard, DON Miller testified, consistent with a rule published in the Respondent's employee handbook, that she is the only person who can approve overtime pay. Miller also testified that she issued a disciplinary notice to nurse Clark for violating this rule. Thus, at least to the extent that asking an employee to work beyond a shift or come in as a replacement involves overtime pay, it is clear that authority to obtain replacement employees is vested in DON Miller.

<sup>&</sup>lt;sup>10</sup> Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>&</sup>lt;sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 26, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

# MEMBER HURTGEN, dissenting.

I would affirm the judge's finding that nurses Clark, Lewis, and Fritz are supervisors. Thus, I agree with the judge that their conduct was not protected, and the Respondent did not violate the Act by discharging them.

I agree with the judge that the nurses are supervisors by virtue of their authority to responsibly direct and to assign employees. Nurses have reassigned aides within their wings, based on the nurses' assessment of patient needs and on their judgment of the aides' ability to give appropriate care. More particularly, nurses assign aides within a wing in response to emergency situations, e.g., when a patient becomes acutely ill, suicidal, or badly confused. In my view, it is the very essence of independent judgment for a nurse to decide which aides can best handle these dire emergencies. Surely, this is not a "routine judgment."

Similarly, nurses have the authority to reassign aides between wings. More particularly, a nurse has the authority to make the request, and the other nurse has the authority to turn it down. In sum, the question of where an aide will work is left to the judgment of two nurses. In my view, and consistent with Section 2(11), this authority is a strong indicium of supervisory authority. The fact that the nurses act in a collaborative way does not diminish their supervisory status. Supervisors can, and do, collaborate in their assignment of work to employees.<sup>1</sup>

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

I do not agree that these reassignments involve simply "counting." If only arithmetic were involved, there would be no discretion of a nurse to choose to honor or decline a fellow nurse's request.

Nurses also exercise supervisory authority by calling employees in to work and by requesting employees to work beyond the end of a shift. I do not consider the exercise of this authority any less substantive because the employee is not required to come in or stay. At the very least, the nurse gives the aide an opportunity to earn extra money and overtime.

Nurses also have the authority to permit aides to leave work early. My colleagues contend that there is no independent judgement involved in determining whether an employee is too sick to work or whether a "family emergency" is severe enough to require the release of the employee. I suggest that these are not matters of rote or automaticity. They require discretion and judgment.

In addition, I note that nurses assign breaktimes and can change previously set breaktimes.

I agree that bare job descriptions do not themselves establish supervisory authority. However, they are not irrelevant to the issue of supervisory status. Where, as here, the job descriptions are not bare, i.e., there is conduct consistent with the job description, that job description is clearly relevant. In the instant case, the job description says that nurses must plan effective administration of their assigned units, review and interpret subordinates' work performance against accepted standards, and may reprimand and, or, dismiss personnel. In addition, the job description of aides says that they are to "perform assigned duties at the direction and under the supervision" of the nurses.

Further, nurses are evaluated on their ability to "take charge of and direct subordinates." My colleagues suggest that this does not include the direction of aides. Since aides are "subordinates" of nurses, I believe that my colleagues are incorrect.

Finally, I note that the nurses are the highest-ranking employees in the facility 14–16 hours each day. During those times, the entire facility operates under their direction. A finding that the nurses are not supervisors would produce the anomalous result that the Respondent's facility routinely operates without any onsite supervision. That is an unlikely prospect in a health care facility.

Based on all of the above, I find the nurses who are the subjects of the complaint are not employees protected by the statute. Accordingly, I would dismiss the complaint.

# APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

<sup>&</sup>lt;sup>1</sup> My colleagues contend that an aide could refuse a direct order to report to another wing. I do not believe that the record supports this contention.

# NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with the loss of their nursing licenses for engaging in protected concerted activities.

WE WILL NOT warn or otherwise discipline employees for engaging in protected concerted activities.

WE WILL NOT discharge employees for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed employees by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, plus interest, in the manner set forth in the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful disciplinary warnings issued to Erica J. Lewis and Melanie M. Fritz, and to the unlawful discharges of Cynthia A. Clark, Erica J. Lewis, and Melanie M. Fritz, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the disciplinary warnings and discharges will not be used against them in any way.

# LOYALHANNA HEALTH CARE ASSOCIATES, T/D/B/A LOYALHANNA CARE CENTER

David Shepley, Esq., for the General Counsel.

Robert J. Cromer, Esq., of Trafford, Pennsylvania, for the Respondent.

## **DECISION**

#### STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. Upon charges filed on November 19, and December 30, 1996, and on January 3, 1997, by, respectively, Cynthia Clark, Erica Lewis, and Melanie Fritz, individuals, against Loyalhanna Health Care Associates, t/d/b/a Loyalhanna Care Center, a Pennsylvania Limited Partnership herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a Consolidated Complaint dated April 16, 1997, alleging violations by Respondent of Section 8(a)(1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act. Respondent, by its Answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Pittsburgh, Pennsylvania, on May 14, 1997, at which the General Counsel and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in these cases, and from my observations of the witnesses, I make the following

#### FINDINGS OF FACT

## I. JURISDICTION

Respondent, a Pennsylvania Limited Partnership with an office and place of business in Latrobe, Pennsylvania, is engaged in the operation of a nursing home providing in-patient medical and professional care for the elderly, sick and infirm. During the 12-month period ending October 31, 1996, a representative time frame, Respondent, in conducting its business operations at the Latrobe, facility, derived gross revenues in excess of \$100,000. In the same period, it purchased and received at the facility goods valued in excess of \$5000, sent directly from points outside the Commonwealth of Pennsylvania, and purchased and received additional goods valued in excess of \$5000, from enterprises located within the Commonwealth which, in turn, had received those goods directly from points outside Pennsylvania. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.

## II. THE UNFAIR LABOR PRACTICES

# A. Background

The Loyalhanna nursing home contains 120 beds and is divided into a north wing, housing individuals requiring skilled nursing care, and a south wing, which serves as a residential facility for those needing less intensive care. The home, which operates 4 somewhat overlapping shifts of workers providing nursing and related services, employs some 120 people, including 20 registered nurses, 8 licensed practical nurses and 45 to 50 nurses' aides. All registered nurses and licensed practical nurses hold the title of nurse manager and, consistent with their training and abilities, the registered nurses are generally assigned to the more demanding north wing, while the licensed

practical nurses usually staff the south wing. A minimum of three registered nurses work the day shift (7 a.m. to 3:30 p.m.), and two are assigned to the afternoon shift (3:00 p.m. to 11:30 p.m.). By law, at least one registered nurse must be on duty at all times. Resident care is provided under the overall supervision of Director of Nursing Carol Miller, Assistant Director of Nursing Jacqueline Gaydar and Resident Care Coordinator Jennifer Ream, all of whom are statutory supervisors.

In the instant cases, the General Counsel contends that, in September, 1996, Respondent violated Section 8(a)(1) of the Act by discharging Registered Nurse Cynthia Clark, and issuing an employee warning report to Registered Nurse Melanie Fritz, because of their concerted complaints to management officials concerning wages, hours and working conditions. Further, the General Counsel urges, in November, 1996, Respondent engaged in additional such statutory violations by issuing "friendly reminder" notices to Fritz and Registered Nurse Erica Lewis; by issuing an employee warning report to Lewis; by threatening Lewis with loss of her license and by discharging Fritz and Lewis because of their earlier concerted complaints and because they gave testimony on behalf of Clark at a Pennsylvania Unemployment Compensation Board of Review hearing. Respondent argues that neither Fritz nor Lewis were discharged but, rather, that they voluntarily quit their employment, and that Clark was fired, and the others disciplined, for misconduct, and not in reprisal for protected actions. Respondent further contends that Clark, Lewis and Fritz were, at all material times, statutory supervisors, outside the Act's protections.

# B. Facts<sup>1</sup>

# 1. The discipline received, and separations from employment suffered, by Clark, Fritz, and Lewis

At 3:00 p.m. on September 25, 1996, the registered nurses assigned to the north wing for the afternoon shift, Cynthia Clark and Melanie Fritz, along with Registered Nurse Erica Lewis, who had been hired 2 weeks before and was completing her orientation period under Clark, gathered in the medication room. The nurses were preparing to care for the 50 to 55 patients on their wing, and would be assisted in that regard by some 5 aides. Gaydar, the assistant director of nursing, entered the room and Clark complained that she, Gaydar, had scheduled Clark to work on the next Saturday, which was to be a day off for her. Gaydar ripped the schedule off the wall, stated that she hated her job and left the room. She returned a few minutes later and showed Clark a piece of paper on which Clark had agreed to switch days with another nurse and to work on the Saturday in question. Clark said that she had forgotten, and she apologized to Gaydar several times. Gaydar asked how Lewis'

orientation was working out, and Clark said that Lewis was doing a good job and was a good nurse. At that point, one of the nurses said that it was going to be nice having three nurses on the shift that day, due to Lewis presence for orientation, rather than the usual two. Clark said that "it would be nice if we could have three nurses every night . . . the extra hand is helpful. . . we are busy, we do not get out on time . . . with that third person, it helps." Gaydar responded, stating that the Director, Miller, had worked hard to get a second nurse on the south wing, and that there would not be a third nurse for the north wing. Gaydar added that the licensed practical nurses assigned to the south wing were to come over to assist on north wing, as needed. Clark said that, when called, they do not always come, and Fritz complained that, as a result, the north wing nurses always get out late. Gaydar answered, saying that "you are the RNs, you tell them to come over here." She added that, in any event, "you are not going to get a third nurse, you know, you just live with it." Gaydar further stated that the home's administrator, Dale Hohman, had said that the nurses were not worth what they were paid, and were "a dime a dozen." Fritz asked if Miller cared, and Gaydar said, yes, but there was not anything that she could do about it. Clark said that if management felt they were "a dime a dozen," then, perhaps, a group of nurses should stand outside the facility, flip a dime and let the home's managers find out how many of them they can replace.

As the discussion continued, Gaydar told Clark that, after giving Clark a 60-cent per hour raise on her last evaluation, she, Gaydar, was reprimanded for having done so. Gaydar told the nurses that, thereafter, all evaluations had to go through Miller and, further, that Hohman had instructed that wage increases not be given with evaluations. Clark asked, "Well, why is that? Don't you think we deserve it?" Gaydar said she did not know why the nurses stayed at the facility as other nursing homes paid more, adding that Loyalhanna would never pay "top dollar." Gaydar further stated that she hoped that Hohman had another, and fatal, heart attack. Fritz asked why the nurses were not paid as much as those employed at other homes, and said that the wage policy was not fair. It is undisputed that, during the course of the conversation, voices were not raised.

On the next day, September 26, Director of Nursing Miller met with Clark and Fritz before the start of their shift. Miller, in her office and in the presence of Gaydar, told the nurses that she, Miller, had heard about what had happened on the previous day, in the medication room, and would not tolerate it any longer. Gaydar reported that Clark had screamed at her about the work schedule, disrespected her and talked about Hohman. Fritz denied that voices were raised and told Miller that Clark, after calmly inquiring about the schedule, was shown her mistake, admitted to same and apologized. Miller responded by telling Clark that she was fired and handing to her an employee warning report, imposing discharge, for disrespect of a supervisor, arguing and creating disharmony by complaining to the assistant director "re: schedule; wages; supervisors & owner of home." The warning report also referred to a prior verbal warning, seven months earlier, for causing disharmony, use of profanity and disrespect of a supervisor. While Gaydar was out of the office, Miller told Clark that she, Clark, was a good nurse

<sup>&</sup>lt;sup>1</sup> The fact-findings contained herein are based upon a composite of the documentary and testimonial evidence introduced at trial. Indeed, concerning most critical matters, the evidence is undisputed. However, with regard to certain areas, generally dealing with oral reports received by Director of Nursing Miller and the reasons for actions she took in response thereto, I have viewed Miller's testimony with great suspicion in light of her evasiveness as a witness and Respondent's unexplained failure to call as witnesses available individuals in position to corroborate Miller's claims.

and that Miller did not want to fire her but had been ordered to do so. After Clark's departure, Miller gave Fritz a warning report, containing a verbal warning for her conduct on September 25, namely, creating disharmony in the work place, and disrespect of a supervisor, by engaging in an unprofessional confrontation and complaining of "short-staffing" and "poor wages." The report noted that the foregoing conduct occurred in the presence of an employee on orientation. Fritz said that she had not disrespected anyone, and she denied having engaged in misconduct.

A short while later on September 26, Lewis, after learning that Clark had been discharged and Fritz had been disciplined for their conduct on the previous day, went in to see Miller. Lewis reported that Clark had not raised her voice during the September 25, conversation, and had apologized twice about her mistake concerning the schedule. Miller said that she had been unaware of those facts.

At trial, Miller testified that she discharged Clark for "behavior attitude types of things," including disrespect and arguing on the premises, after investigating the September 25, incident, and learning from 4 to 5 employees that there were loud voices in the medication room that day and that Clark was irate and was slamming doors. Likewise, Miller claimed, concerning her decision to discipline Fritz, that "it was reported to me that Melanie Fritz was also involved in that in the respect that she had made mention of a few things that were considered insubordinate or creating disharmony." Nonetheless, Respondent did not offer the testimony of Gaydar, or of any of the 4 to 5 employees allegedly relied upon by Miller as informants, concerning the September 25, incident. Indeed, the undisputed record evidence shows that, in the course of the conversation in the medication room that day, only Clark, Fritz, Lewis and Gaydar were present.

A hearing before the Pennsylvania Unemployment Compensation Board of Review was held on November 8, 1996, to address Respondent's denial of Clark's claim for unemployment compensation benefits. Fritz and Lewis were subpoenaed to appear on behalf of Clark and they did so, testifying in support of Clark's version of the events of September 25, and contrary to Gaydar's. Thus, Fritz and Lewis testified that, in the course of the conversation in the medication room that day, Clark did not raise her voice and did not disrespect Gaydar. Additionally, Lewis testified that Respondent's witness, Nurse McCreary, lied in her testimony when she claimed that she was present in the medication room during the critical conversation and heard Clark speaking disrespectfully. Ultimately, the Unemployment Compensation Referee, Mike Sillett, ruled in favor of Clark.

Following the hearing, later on November 8, Fritz reported to work at the facility for the afternoon shift. Gaydar immediately handed to Fritz a "friendly reminder," a disciplinary form used for first offense rule infractions, dated November 8, stating that a resident's family member had complained that Fritz was "walking past call lights" and allowing aides to take their breaks together. Fritz asked who the family member was, and Gaydar said it was Rita Palguta, the daughter of resident Agnes Palguta. Fritz denied the charges and asked to speak to Rita Palguta so as to be able to defend herself. Gaydar told Fritz

that she could not talk to Palguta and, further, that Palguta was going to file a "grievance" with the State which would result in an investigation that could affect Fritz' nursing license. Fritz stated that she thought the entire matter was about her having testified at the Clark hearing earlier in the day.

On the next day, November 9, Gaydar orally accused Fritz of having walked past a call bell on November 8, after she had received the "friendly reminder," as allegedly observed by Miller. Fritz denied this and said that Gaydar was acting in retaliation for Fritz' truthful testimony on the day before. Gaydar answered, saying that she, Fritz, perceived the events of September 25, much differently than Gaydar did. Fritz became upset and said that she would quit. On her next work day, November 11, she handed to Gaydar a 2-week resignation notice, as required by Respondent's rules, stating that her last work day would be November 24. However, on November 18, Gaydar called Fritz at home and told her not to come back to work. When Fritz protested, Gaydar stated that she, Fritz, would not be allowed to work out her notice period as Hohman considered her "not too nice."

Lewis did not work on November 8, her day off. On the next day, November 9, upon reporting to work, she was called into Gaydar's office and presented with two disciplinary forms, "friendly reminders," dated November 8. The first such document accused Lewis of failing to check the patients' weekly vital signs sheet for abnormal results, while the second, identical to the one given to Fritz on the previous day, stated that Lewis had walked past call lights, and allowed the aides to take their breaks together, as reported by a resident's family member. Gaydar told Lewis that Rita Palguta had complained about her mother having had an elevated and untreated body temperature, and had also complained about the other matters. Further, Gaydar informed Lewis, Palguta had filed a complaint with Loyalhanna and had called the Pennsylvania ombudsman, an official charged with investigating charges against nursing homes. Gaydar said that Lewis could "lose your license for this," claiming that Palguta specifically had named Fritz and Lewis as responsible for inadequate residential care. When Lewis stated that she believed that the disciplinary notices were as a result of her testimony on the previous day, Gaydar denied it, but also stated that while she, Gaydar, knew that Lewis' testimony would differ from her own, Lewis' testimony, in fact, was "really different."

Two days later, on November 11, Lewis gave Gaydar a written 2-week notice of resignation. On that day, she happened to meet Rita Palguta in the hallway and, after speaking to her, Lewis asked Palguta to accompany her to Gaydar's office. Rita Palguta did so, and she told Gaydar, in the presence of Lewis, that she, Palguta, "never filed a grievance, I never called the State . . . I have never had any problem with these nurses. . . I don't know what you are talking about." At trial, Palguta appeared as a witness and testified that, in fact, she had not complained to Respondent about Fritz or Lewis, and she had been assured by Miller that Fritz and Lewis left their employment for unrelated reasons.

Immediately after the above-noted meeting in Gaydar's office, Miller and Gaydar met with Lewis, and Miller told Lewis that she had "crossed the line." Miller showed Lewis 2 "postit" notes, purportedly showing that Palguta had complained

about her mother's untreated temperature and about unanswered call lights. Neither Lewis' nor Fritz' name appeared on the notes, nor did they contain mention of a grievance or a complaint to the State. Miller instructed Lewis that she was not to work out her 2-week notice, and she was to "just leave and don't come back." When Lewis asked for a written statement reflecting that she was not being allowed to work out her notice period, Miller gave her an employee warning report, dated that day, relieving Lewis of her notice obligation in order "to alleviate further disharmony among the nursing staff."

Miller testified that she did not let Lewis work out her notice period because she was being disruptive and had a bad attitude toward her co-workers. No corroborative testimony was offered by Respondent. Regarding Fritz, Miller intimated that she was not allowed to work her second notice week because she had already been replaced. However, documentary evidence established that, during the week in question, on 5 of the 6 days on which Fritz initially had been scheduled to work, other registered nurses worked double shifts, or 16-hour days.

# 2. Supervisory status

Nurses at the Loyalhanna home, unlike other employees, are required to wear an all-white uniform. Registered nurses are paid at an higher hourly rate than licensed practical nurses who, in turn, are much higher paid than the certified and noncertified aides. Respondent's written job descriptions inform aides that they are to "perform assigned duties at the direction and under the supervision" of the nurse managers. Registered nurses, according to these descriptions, must plan effective administration of their assigned units, review and interpret subordinates' work performance against accepted standards and may reprimand and, or, dismiss personnel. Although employees, at the time of hire, are required to sign copies of their job descriptions, and Clark, Fritz and Lewis all did so, each of them testified that she was not aware, while employed by Respondent, that she had authority to hire, fire, discipline or reprimand aides.

Very significantly, registered nurses are the highest ranking employees on duty at the facility for 14 to 16 hours each day. They are responsible for the work quality on the floor, and the clerks, aides and practical nurses report to them. Only the registered nurses have the authority to summon a doctor or arrange for patient transportation to a hospital. When in charge of the facility, as they are most of the time, they must find replacements for aides or practical nurses who call-in sick, a frequent occurrence. They also assign break times to the aides and practical nurses and can change their work assignments, and previously set breaks, as conditions and the workload warrant. The registered nurses can, in the exercise of their discretion, permit early dismissal of other employees, for example, in the case of illness or family emergency. The registered nurses give direction to the others in their work, in connection with the treatment of patients, and are responsible for employees' proper performance of duties. Indeed, these nurses are evaluated, in part, on their ability to take charge of and direct staff. Thus, in her April 26, 1996, evaluation, Clark was complemented for her ability to "take charge of her subordinates," while, in her evaluation of May 24, 1996, Fritz was praised for her ability "to direct subordinates firmly but effectively."

The registered nurses also participate in Respondent's disciplinary procedures with respect to subordinates. Thus, they can, and do, initiate such procedures by filling out, as the "person who prepared warning," the company statement, or version of the occurrence complained of, as contained in employee warning reports. They may also recommend, but they seldom do so, that the director of nursing, or the resident care coordinator, impose, or not impose, particular discipline. When a recommendation is made, it is generally followed, although higher management still conducts its own investigation of the facts. A progressive disciplinary system is in use.

## C. Conclusions

The undisputed record evidence establishes that Clark and Fritz, in the presence of Lewis, engaged in protected concerted type activities on September 25, 1996, when they together complained to the assistant director of nursing about wages, staff levels and working conditions. There is a lack of any record evidence to show that the nurses did so in such a manner as would result in a loss of the Act's protections. On the next day, Miller angrily discharged Clark, and disciplined Fritz, for their conduct of September 25, namely, complaining to Gaydar about, inter alia, "poor wages" and "short-staffing." The General Counsel's strong prima facie case of retaliatory discharge and discipline stands unrebutted as Respondent has not shown that it would have fired Clark, or issued a warning report to Fritz, absent their concerted protests.

Immediately after Fritz and Lewis testified on behalf of Clark, at a November 8, 1996, unemployment compensation hearing, they were disciplined for malfeasance, as allegedly reported by Rita Palguta, the daughter of a resident. Concurrently, Gaydar expressed to Fritz and Lewis her displeasure at their testimony. In addition, the evidence of record in this case establishes that Palguta did not voice to Respondent complaints about either Fritz or Lewis, and Gaydar fully understood that. The timing of the disciplinary actions, Respondent's animus toward the nurses' conduct in testifying on behalf of Clark and the patently groundless reasons assigned to support the discipline, establish that the disciplinary actions were in retaliation for protected concerted type activities. Likewise, it was those activities which motivated Gaydar, when she disciplined Lewis, to threaten that nurse with loss of her license due to the matters supposedly reported by Palguta.

Respondent discharged Fritz on November 18, and Lewis on November 11, by refusing to allow them to work out their 2week notice periods. In light of Respondent's animus toward their conduct on November 8, resulting in the imposition of discipline, the contemporaneous discharges must be viewed, prima facie, as resulting from that same conduct. Respondent has failed to show that it would have discharged Fritz, or Lewis, even absent their protected type conduct. Thus, as shown in the Statement of Facts, Director of Nursing Miller's suggestion, that Fritz was not permitted to work out her notice period due to staffing needs, is belied by the record evidence showing that Respondent terminated Fritz' employment at a time when it was so short of nursing staff that other registered nurses were required to work 16-hour double shifts, on almost every day, for the remainder of the original notice period. Miller's testimony, that she did not let Lewis work out her notice period because she was being disruptive and had a bad attitude toward co-workers, was not substantiated and, for the reasons stated at footnote 1, is discredited.

I conclude, however, that Respondent has not engaged in conduct violative of the Act for the reason that, as urged by Loyalhanna, Registered Nurses Clark, Fritz and Lewis, while employed by the nursing home, were supervisors within the meaning of Section 2(11) of the Act. At the very least, as registered nurses, they exercised supervisory authority, by responsibly assigning and directing employees, in discharging their responsibilities to select and call employees in for work and, in their discretion and judgment, allowing employees to take time off. Such exercise of supervisory powers was pursuant to the nurses' written job descriptions encompassing the responsibility to direct other staff employees, and to manage the overall workload. Indeed, at least two-thirds of the time, the entire facility operated under the direction of the registered nurses who, in the course of running the home, regularly changed the work assignments of the employees at each wing of the facility and, as needed, temporarily transferred employees between wings. I also note that a finding that the registered nurses

were not supervisors would mean that this large nursing home routinely operated without any onsite supervision for some 14 to 16 hours each day, an anomalous result.<sup>2</sup>

## CONCLUSIONS OF LAW

- 1. Loyalhanna Health Care Associates, t/d/b/a Loyalhanna Care Center, a Pennsylvania Limited Partnership, is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act.
- 2. Respondent did not violate the Act by discharging its supervisors, registered nurses Cynthia Clark, Erica Lewis, and Melanie Fritz.

[Recommended Order for dismissal omitted from publication.]

<sup>&</sup>lt;sup>2</sup> See Pine Manor Nursing Center, 270 NLRB 1008 (1984); Cf. Illinois Veterans Home at Anna L.P., 323 NLRB 890 (1997).